Supreme Court, U.S.
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No. 92-1202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GARY KNOP, *et al.*,

Petitioners,

v.

KENNETH L. McGINNIS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

The respondents suggest several arguments in an attempt to distinguish City of Canton v. Harris, 109 S.Ct. 1197 (1989), from this case. First, the respondents argue that the standard used by the court of appeals in reversing the district court is not "substantively different" from the City of Canton standard. Respondents' Brief at 14. However, as demonstrated in the petition for certiorari, the trial court made all the findings required under City of Canton to hold a governmental entity responsible for a constitutional violation actually executed by individual employees. The court of appeals did not reverse any of these findings as clearly erroneous, or even indicate a disagreement with these findings.[1] Instead, the court of appeals

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[1] Respondents suggest that "the outcome of this case depends solely upon its own unique facts." Respondents' Brief at 14. However, the court of appeals did not (continued...)

reversed because it applied a different standard to the trial court's findings; the court of appeals found that the respondents did not "encourage" the racial harassment. App. at 32.

Under the deliberate indifference standard of City of Canton, the focus is on the degree of fault that "must be evidenced by the [government's] inaction before liability will be permitted." Id. at 1204. (Emphasis supplied).

In contrast, the "encouragement" standard applied by the court of appeals in this case seems to assume that inaction can never make a governmental unit responsible for constitutional violations by its employees. By requiring that the

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[1](...continued)
reverse any of the trial court's findings as clearly erroneous. Necessarily, then, the critical factor was the court of appeals' application of its own standard rather than the City of Canton standard.

If this case turned on its facts, the trial court should have been affirmed.

policymakers actively promote or "encourage" the constitutional violation, the court of appeals failed to heed the teaching of City of Canton.

Respondents also suggest that City of Canton does not apply because that case involved municipal defendants, while in this case state officials are defendants. See Respondents' Brief at 17-21.[2] Because the petitioners in this case seek injunctive relief, however, the state officials sued in their official capacities have the same defenses as those available to municipal defendants. See, e.g., Kentucky v. Graham, 473 U.S. 159, 166-167, 169 n.18 (1985).

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[2] Respondents appear to suggest that the Department of Corrections should have been named as a defendant. See Respondents' Brief at 15. Of course, the Department of Corrections was not a proper defendant; the proper defendants for claims requesting injunctive relief were the state officials sued in their official capacities. See Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

Similarly, the respondents argue that the persons who carried out the deprivation of constitutional rights in this case are individual officers who are not sued as defendants.[3] In City of Canton, however, this Court indicated that a municipality as an entity would be liable for a policy or custom of failing to train its police officers if that policy resulted in injury. Accordingly, the issue in City of Canton was precisely the circumstances in which governmental policymakers, and thus the governmental unit as an entity, are responsible for a constitutional violation executed by individual employees.

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[3] The respondents suggest that the racial slurs were caused by "a few non-party prison authorities." Respondents' Brief at 11. Respondents' characterization of the record is unsupported by the actual findings of the trial court. The trial court "specifically [did] not find that most correctional staff engage in this kind of behavior. A sufficiently large number do, however, to expose black inmates to a constitutionally intolerable atmosphere of racial harassment." App. at 124.

The respondents also seek to distinguish City of Canton by arguing that that case describes the standard for "failure to train" cases. See Respondents' Brief at 9-10. While true, this observation does not assist respondents. In essence, the petitioners' claim here is that the responsible defendants failed to supervise the staff who engaged in racial slurs. In City of Canton, the Court repeatedly cites cases involving claims of a failure to supervise employees as examples of cases involving "failure to train" claims. See, e.g., 109 S.Ct. at 1204 n.6; see also id. at 1209 (O'Connor, J., concurring).

Respondents also appear to suggest that an official policy or custom of racial harassment cannot violate the Constitution. See Respondents' Brief at 24-25. None of the cases cited by respondents supports such an argument. In fact, Poe v. Haydon, 853 F.2d 418, 429 (6th Cir. 1988), cited by

respondents at p.24 of their brief, holds that "[t]he case law before December 1984 established that sexual harassment by government employees would violate the rights protected by the equal protection clause." Harassment on the basis of race surely has no greater constitutional protection than harassment on the basis of sex.

Finally, respondents argue that Rizzo v. Goode, 423 U.S. 362 (1976), requires a "deliberate plan" of misconduct by the named defendants. Respondents' Brief at 21. In fact, Rizzo does not speak of a "deliberate plan." Rather, Rizzo notes that, in that case, "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners." Rizzo at 371. But City of Canton is completely consistent with Rizzo. Under City of Canton, the "affirmative link" demanded by

Rizzo is supplied when the governmental unit is deliberately indifferent to unconstitutional acts by its employees, resulting in a "policy or custom" of misconduct. In this case, the trial court found both conscious indifference[4] and the existence of a "policy or custom." Under these circumstances, petitioners met the standard for relief set forth in City of Canton and the court of appeals erred in reversing.

CONCLUSION

For all the reasons set forth herein, petitioners urge that the Court grant certiorari.

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[4] See discussion in petitioners' opening brief at 18-19, n.6.

Respectfully submitted,

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